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# Fair Housing Laws and the Constitutional Rights of Roommate Seekers

**Keywords**

Fair housing laws, federal Fair Housing Act, Civil Rights Act, Department of Fair Employment and Housing v. Larrick, Marya v. Slakey, Department of Fair Employment and Housing v. DeSantis, Sprague v. City of Madison, Department of Fair Employment and Housing v. Baker

# FAIR HOUSING LAWS AND THE CONSTITUTIONAL RIGHTS OF ROOMMATE SEEKERS

By  
Chris A. Kolosov\*

## INTRODUCTION

Imagine a biracial, heterosexual, female Buddhist, new to Los Angeles and looking for a place to live. Short of money, she notes the following roommate-wanted ads:

1. We are three Christian females... We have weekly bible studies and bi-weekly times of fellowship.<sup>1</sup>
2. The person applying for the room MUST be a BLACK GAY MALE.<sup>2</sup>
3. This is a Christian home and we are looking for a Christian female to rent a downstairs room.<sup>3</sup>

She is unwelcome in at least two of the apartments, but each ad is presumptively illegal. Fair housing laws prohibit discrimination based on religion, race, sex and, in some jurisdictions, sexual orientation.<sup>4</sup> The federal Fair Housing Act ("FHA") and many state statutes and municipal ordinances exempt "Mrs. Murphy"<sup>5</sup> landlords, who rent out rooms or apartments in smaller buildings where they reside. These landlords can usually discriminate when selecting tenants, so long as they do not advertise preferences or state discriminatory reasons for rejecting applicants.<sup>6</sup> In most states, these exemptions apply to roommate-seekers, but some jurisdictions are more restrictive.<sup>7</sup> Further, the Supreme Court has held that the Civil Rights Act of 1866<sup>8</sup> prohibits racial discrimination and many forms of national origin discrimination in housing,<sup>9</sup> and several lower courts have concluded that the FHA does not preclude claims under the 1866 Act.<sup>10</sup> Thus, both Mrs. Murphy landlords and roommate seekers could be held liable for refusing to rent to people who are protected under the 1866 Act.

Today, people seeking roommates outnumber classic Mrs. Murphy landlords,<sup>11</sup> but, despite the distinct compatibility concerns involved, fair housing laws do not acknowledge this group as a separate category. Whereas boarding house owners may impose rules upon tenants,<sup>12</sup> compatibility is particularly important to roommates as their conflicts are typically resolved through discussion and compromise. Many landlords who enjoy the Mrs. Murphy exemptions merely rent out separate apartments in buildings where they also reside. In this article, I explore whether fair housing laws violate the intimate association, privacy, and free speech rights of people seeking roommates to share their kitchens, bathrooms, and other common living areas. I examine three types of laws: prohibitions on using discriminatory criteria when selecting a roommate, prohibitions on placing discriminatory advertisements, and prohibitions on making discriminatory statements when interviewing potential candidates.

In Part II, I describe several adjudications in the roommate context, including cases brought against Internet sites that provide forums and matching services for roommate seekers. In Part III, I examine laws that bar discriminatory selection and conclude that federal intimate association and privacy rights, as well as privacy rights granted by the California constitution, are violated if individuals do not have a completely free choice in

selecting a roommate. In Part IV, I analyze advertising restrictions from both an intimate associate and privacy perspective and under the commercial speech doctrine. I determine that, although such restrictions survive intimate association and privacy challenges, only restrictions on discriminatory ads related to race, ethnicity or national origin survive a free speech challenge. In Part V, I explain why prohibitions on discriminatory statements are even more problematic, violating free speech, privacy and intimate association rights. I conclude that, while it is wise policy to allow roommate seekers greater leeway in advertising some preferences, restrictions on ads expressing preferences related to race, national origin and ethnicity are not only constitutional, they are likely to advance the goals of the Fair Housing Act.

## II. THE ADJUDICATION OF ROOMMATE DISCRIMINATION CLAIMS

Agency commissioners, and state and federal judges, have adjudicated cases brought by rebuffed roommate applicants. A brief survey of a few such cases provides context for the constitutional rights discussion that follows.<sup>13</sup>

### 1. PROHIBITIONS ON DISCRIMINATORY ROOMMATE SELECTION AND STATEMENTS

In *Department of Fair Employment and Housing v. Larrick*,<sup>14</sup> two Caucasian women were seeking a third roommate "to share their unit and help pay the rent."<sup>15</sup> During a phone conversation, one of the women told a bi-racial applicant that her other roommate did not want to live with a black person. The roommate seekers were found liable<sup>16</sup> for discriminating on the basis of race and for making racially discriminatory statements. None of the exceptions to California's Fair Housing code applied to the respondents because more than one roomer or boarder lived in the dwelling.<sup>17</sup>

In *Marya v. Slakey*,<sup>18</sup> an applicant sued the owner of a six-bedroom house after a co-tenant discriminated against her. The tenants executed a single lease and advertised and filled vacancies after one-on-one interviews. Decisions on which candidate to select had to be unanimous, and all tenants had to be non-smoking, vegetarian students. One tenant declined to interview the applicant, explaining that two Indian women already lived in the house, and he did not want to live "with three people of the same cultural orientation."<sup>19</sup> The applicant alleged she had been denied housing on the basis of her race, color, national origin and/or sex.<sup>20</sup> The court held that the Mrs. Murphy exemption did not apply and would not have permitted discriminatory statements in any case. The court did not conclude that the roommates were entitled to any special protections when creating criteria for cohabitants.<sup>21</sup>

## 2. PROHIBITION ON DISCRIMINATORY ROOMMATE SELECTION

The Wisconsin Court of Appeals reviewed a local ordinance prohibiting discrimination on the basis of sexual orientation in *Sprague v. City of Madison*.<sup>22</sup> Two roommates extended an offer to a lesbian but later withdrew it, stating that they were not comfortable living with her. The court held that the ordinance unambiguously applied in all housing rentals and rejected the appellants' argument that it was unconstitutional in the roommate context: "Appellants gave up their unqualified right to such constitutional protections when they rented housing for profit."<sup>23</sup> Subsequent to commencement of the case, Madison's City Council had amended the ordinance<sup>24</sup> to exempt roommates, but the court nonetheless held the defendants liable.<sup>25</sup> The court's conclusion that the solicitation of co-roommates constitutes "renting housing for profit," and that renters who do so forfeit their privacy and First Amendment rights, may mean that people who lack the resources to live alone are particularly at risk of facing infringements on their constitutional rights.

## 3. PROHIBITIONS ON STATEMENTS/ADVERTISEMENTS EXPRESSING PREFERENCES

In *Department of Fair Employment and Housing v. DeSantis*, a woman renter sought a roommate to share her two-bedroom apartment "to help pay the rent."<sup>26</sup> An African American male potential renter stated that the advertised room was too small, and asked to see the other bedroom. The woman refused, indicating it was her room. The applicant later claimed that she told him no room was available, and that she had denied him the rental due to his race. A housing-rights group sent one Caucasian and one African American tester to the apartment. The respondent told the Caucasian tester that she "really [doesn't] like black guys. I try to be fair and all, but they scare me."<sup>27</sup> She was legally permitted to discriminate in selecting a roommate under California's single roomer exemption, but was held liable for making a discriminatory statement.<sup>28</sup>

In *Fair Housing Advocates Association v. McGlynn*,<sup>29</sup> a black female responded to an ad seeking a female roommate placed by a white male. After inquiring about her race, he told her "blacks should live with blacks and whites should live with whites."<sup>30</sup> A fair housing organization then had testers contact the respondent.<sup>31</sup> His behavior suggested he may have been seeking not just roommate, but a girlfriend.<sup>32</sup> He asked a black tester about her occupation, if she smoked or drank, if she had a boyfriend and why she was not living with him, and if it would bother her that he was a white smoker who drank.<sup>33</sup> He invited her to the apartment, but she left after he asked her if she wanted a massage and then asked for a kiss.<sup>34</sup> The respondent was found liable for placing a discriminatory ad and for making discriminatory statements.<sup>35</sup>

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*The Court's decision may mean that people who lack the resources to live alone are particularly at risk of facing infringements on their constitutional rights.*

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## 4. PERMITTING SEXUAL ORIENTATION DISCRIMINATION

The commissioners in *Department of Fair Employment and Housing v. Baker*<sup>36</sup> concluded that California's statute prohibiting sexual orientation discrimination did not apply to a roommate seeker. The respondent rejected a lesbian applicant via voicemail, stating his other roommate was a Christian Fundamentalist, and they "would not get along too well."<sup>37</sup> The commissioners explained that sexual orientation discrimination was incorporated into California fair housing law through the Unruh Civil Rights Act,<sup>38</sup> which applies only to "business establishments,"<sup>39</sup> and "does not apply to those relationships that are truly private."<sup>40</sup> They further stated "truly private and social relationships" are protected by the right of intimate association, and held that the record did not reveal whether the respondent's housemate relationship "was sufficiently non-continuous, non-personal and non-social to preclude being a constitutionally protected intimate association."<sup>41</sup> The facts were thus insufficient to show that his "housing operation constituted a 'business establishment' rather than a constitutionally protected intimate association."<sup>42</sup>

## 5. CASES AGAINST INTERNET FORUMS OR ROOMMATE SEARCH SERVICE PROVIDERS

In *Chicago Lawyers Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*,<sup>43</sup> a public interest consortium alleged that it had diverted substantial time and resources away from its fair housing program responding to Craigslist's publication of discriminatory classified ads.<sup>44</sup> Many ads appeared to have been placed by roommate seekers.<sup>45</sup> The court held that Craigslist was afforded immunity by the Communications Decency Act (CDA),<sup>46</sup> under which providers of an interactive computer service are not to be treated as the publisher of information created by another content provider. Because Craigslist served only "as a conduit" for information provided by its users, it was not liable for ads that violated fair housing laws.<sup>47</sup> Roommate seekers who place discriminatory ads may nonetheless be held individually liable as the content providers. Although the court's analysis focused on the CDA, in affirming the decision of the district court, the Seventh Circuit hinted at the constitutional rights issues raised by the case, stating: "[A]ny rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the First Amendment."<sup>48</sup>

An online roommate matching service was similarly sued in *Fair Housing Council v. Roommate.com*,<sup>49</sup> but with a very different outcome. Subscribers to the service respond to questionnaires by selecting answers in drop-down menus.<sup>50</sup> The Ninth Circuit concluded that "By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information."<sup>51</sup> The Court thus remanded the case for a

determination as to whether Roommate's publication of certain postings violates the FHA, "or whether they are protected by the First Amendment or other constitutional guarantees."<sup>52</sup>

### III. OUTRIGHT BANS ON DISCRIMINATION

#### 1. FEDERAL INTIMATE ASSOCIATION AND PRIVACY RIGHTS AND DISCRIMINATORY SELECTION

In *Roberts v. Jaycees*, the Supreme Court suggested that the Fourteenth Amendment right to intimate association encompasses roommate relationships, explaining that "highly personal relationships" are protected because "individuals draw much of their emotional enrichment from close ties with others."<sup>53</sup> Though the Supreme Court specifically identified family relationships, the Court imagined other relationships would be similarly protected:

Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as *relative smallness*, a high degree of *selectivity* in decisions to begin and maintain the affiliation, and *seclusion* from others in critical aspects of the relationship. As a general matter only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.<sup>54</sup>

The identification of "selectivity in decisions to begin and maintain the affiliation" underscores that relationships beyond blood ties are protected. Because people cannot choose their families, if only familial relationships were protected, identifying "selectivity in decisions to begin" the association as a criterion for determining whether a relationship is protected would be incongruous. Roommate relationships, in particular, are characterized by each of the three factors identified by the Court in *Roberts*. They are *small*, usually including no more individuals than there are bedrooms in a dwelling. Most people are quite *selective* when deciding to live with another person—they are choosing someone who will have access to their possessions, pets and personal information. And roommate relationships are highly *secluded*. Roommates often see each other in their pajamas or underwear, and when they are sick, exhausted, or just sad. People often hide from the rest of the world aspects of themselves that are unavoidably revealed in the privacy of the home.<sup>55</sup>

Thus, denying the right to choose cohabitants based on personal criteria profoundly violates personal liberty, and fair housing laws that ban discrimination outright should be subjected to strict scrutiny's least restrictive means test. Yet, as "liberty and autonomy" mean little if individuals are powerless to decide with whom to create intimate relationships,<sup>56</sup> no means of combating housing discrimination could be *more* restrictive.

Prohibiting discriminatory selection only when housing is not shared is a reasonable alternative because the result would likely be the same. Because a roommate seeker may consider many factors—compatible schedules, similar tastes in music or television—she can state many reasons for rejecting an applicant, even if consciously or unconsciously her motivation is discriminatory preference. Furthermore, the exemption of Mrs. Murphy landlords from all but the advertising and statement prohibitions illustrates Congress's belief that certain privacy interests are important enough to justify some sacrifice of the FHA's goals.<sup>57</sup> Eliminating roommate choice is thus unlikely to pass the least-restrictive-means test.

*Village of Belle Terre v. Boraas*<sup>58</sup> has nonetheless led some to conclude that federal intimate association and privacy rights do not protect roommates.<sup>59</sup> Six students challenged a zoning ordinance limiting the occupancy of single-family dwellings to traditional families or to groups of not more than two unrelated persons. The Court determined that the ordinance did not compromise any fundamental right to association or privacy. However, a zoning ordinance that prohibits groups of people from living in certain areas is quite different from a law that affirmatively requires an individual to accept a cohabitant. The former only affects where people in an existing relationship may live, but the latter determines with whom an individual must create a relationship, at least if she cannot afford to live alone or would prefer to have a roommate.<sup>60</sup>

In *Carey v. Brown*,<sup>61</sup> the Supreme Court stressed the importance of residential privacy: "The States' interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."<sup>62</sup> The Court continued, "Preserving the sanctity of the home, the one retreat to which men and women can repair to escape the tribulations of their daily pursuits, is surely an important value."<sup>63</sup> Not only has the Court chosen to protect residential privacy,<sup>64</sup> it has recognized privacy within the home as a constitutional right.<sup>65</sup> The range of contexts in which the right has been recognized suggests that it includes autonomy in determining the person roommate seekers are likely to greet first in the morning and see last at day's end.

#### 2. PRIVACY RIGHTS GRANTED UNDER THE CALIFORNIA CONSTITUTION AND LAWS THAT PREVENT SEEKERS FROM ULTIMATELY SELECTING ROOMMATES

At least nine state constitutions provide privacy protections more expansive than those afforded federally.<sup>66</sup> In *City of Santa Barbara v. Adamson*,<sup>67</sup> the California Supreme Court concluded that California's privacy right<sup>68</sup> protects roommate relationships when it struck down a zoning ordinance prohibiting more than five unrelated persons from living together. The Court described the plaintiffs:<sup>69</sup>

They chose to reside with each other when Adamson made it known she was looking for congenial people with whom to share her house. Since then, they explain, they have become a close group with social, economic and psychological commitments to each other . . . they have chosen to live together mainly because of their compatibility. . . . Appellants say that they regard their group as 'a family' and that they seek to share several

values of conventionally composed families. A living arrangement like theirs concededly does achieve many of the personal and practical needs served by traditional family living.<sup>70</sup>

The Court concluded that California's right to privacy encompassed the right to live with whomever one wishes, and Santa Barbara would have to show a compelling public interest in restricting communal living.<sup>71</sup> The highest Courts of New Jersey and New York have concluded that similar zoning laws violated state constitutional privacy or due process protections.<sup>72</sup>

The three part test for invasions of privacy announced by the California Supreme Court in *Hill v. National Collegiate Athletic Association*<sup>73</sup> suggests that roommate relationships are protected beyond the zoning context and that roommate seekers should have autonomy in selecting cohabitants. If a plaintiff establishes: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by [the] defendant constituting a serious invasion of privacy," the defendant must show that the invasion substantively furthers a countervailing interest.<sup>74</sup> The plaintiff may rebut that defendant's assertion by showing there are alternatives with a lesser impact on privacy interests.<sup>75</sup>

In *Tom v. City and County of San Francisco*,<sup>76</sup> an ordinance preventing tenants-in-common from excluding other co-owners from their individual dwellings was struck down under this test. After pooling resources to acquire multi-unit residential property, the co-owners signed right-of-occupancy agreements specifying who would live in which unit. The court explained the effect of the ordinance, which had been passed to discourage the conversion of rental housing to owner-occupied housing: "[U]nrelated persons . . . would be required to share occupancy of their dwelling units with each other, or could not prevent other cotenants from entering their private living space."<sup>77</sup> The court held that the city had articulated no interest that justified "an extreme privacy violation, such as rendering homeowners unable to determine the persons with whom they should live, or forcing them to share their homes with others who are unwelcome."<sup>78</sup>

Fair housing laws that prohibit discriminatory roommate selection have a greater impact on privacy. The ordinance struck down in *Tom* prevented the contractual protection of privacy, and thus tenants-in-common could theoretically have been "forced to share their homes with others who [were] unwelcome." But, as each co-owner was provided an individual dwelling by mutual agreement, it was unlikely anyone would actually invade another's dwelling. However, fair housing laws that require a roommate seeker to accept an applicant create more than a theoretical burden. They force her to share her home with someone "who [is] unwelcome."<sup>79</sup> As virtually any alternative means of combating housing discrimination would have a lesser impact on privacy, such laws are unlikely to be upheld under California's constitution.

#### **IV. PROHIBITIONS ON DISCRIMINATORY ADVERTISEMENTS**

##### **1. DISCRIMINATORY ADVERTISEMENTS AND FEDERAL INTIMATE ASSOCIATION RIGHTS**

The Supreme Court set a high bar for determining when

the right to intimate association has been violated, and federal appeals courts have followed suit. Only laws that "directly and substantially"<sup>80</sup> interfere with the relationship have been struck down, and laws creating significant burdens have been upheld even in the context of marriage, a relationship that is in most cases far more intimate than the relationships created between roommates.<sup>81</sup> Even when roommate seekers desire a close companion and not just someone to share the rent, advertising restrictions may require them to interview candidates whom they are unlikely to choose, but in most cases, the prohibitions do not prevent seekers from identifying suitable roommates and thus do not violate intimate association rights.

In *Zablocki v. Redhail*,<sup>82</sup> the touchstone case for the "direct and substantial" interference standard, the Court reviewed a statute requiring parents with child support obligations to obtain a court's permission prior to remarriage. It held that the law directly and substantially interfered with the fundamental right to marry, because it prevented people who could not prove they could pay child support from remarrying.<sup>83</sup> However, the Court made clear that laws only implicating the right to marry would not face similar scrutiny: "[W]e do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. [R]easonable regulations that do not significantly interfere with the decisions to enter into the marital relationship may be legitimately imposed."<sup>84</sup> The Court found no significant interference in *Califano v. Jobst*,<sup>85</sup> concluding that a Social Security Act provision terminating benefits for a dependent, disabled adult upon marriage to someone ineligible for benefits did not directly and substantially interfere with the right to marry.

The Court's conclusions in *Califano* may have been influenced by its determination that the government has greater authority to attach conditions to recipients of its own benefits. However, in *Montgomery v. Carr*,<sup>86</sup> the Sixth Circuit directly contrasted *Zablocki* and *Califano* without suggesting that a different standard applied in *Califano* because a government benefit was involved. Rather, the court explained "the directness and the substantiality of the interference with the freedom to marry distinguish[ed]" the two cases. It continued: "[w]hatever the form of the government action involved . . . rational basis scrutiny will apply to the rationales offered by government defendants in cases presenting a claim that a plaintiff's associational right to marry has been infringed, unless the burden on the right to marry is direct and substantial."<sup>87</sup>

Furthermore, under the doctrine of unconstitutional conditions, the government may not require a beneficiary to surrender a constitutional right as a condition to receiving a benefit.<sup>88</sup> The Supreme Court has been unpredictable in applying the doctrine,<sup>89</sup> and has almost universally rejected challenges related to government welfare programs.<sup>90</sup> But notably, in cases involving privacy in family relationships, the explanation as to why the laws under review were not found impermissible has been that the government's condition either did not substantially deter the exercise of the rights,<sup>91</sup> or its action was not sufficiently direct.<sup>92</sup> This analysis mirrors the direct and substantial interference test discussed in *Zablocki* and applied in the lower courts.

Even presuming the threshold for direct and substantial interference varies with the government's role, nothing in the case law suggests that requiring roommate seekers to interview additional applicants rises to the level of an unconstitutional burden. Although the advertising restrictions remove a tool for

filtering out candidates whom roommate seekers are unlikely to accept, they create no limitation on seekers' ability to say yes or no to any candidate and thus do not "significantly interfere" with the right to enter into the relationship. Facial challenges succeed only where a law is unconstitutional in all or nearly all of its applications.<sup>93</sup> In the few cases where a roommate seeker could establish that the prohibitions actually prevented her from forming a roommate relationship,<sup>94</sup> she could bring an as-applied challenge. In most cases, the restrictions pass the "direct and substantial interference" test and thus do not violate the Fourteenth Amendment.

## 2. DISCRIMINATORY ADVERTISEMENTS AND OTHER FEDERAL PRIVACY RIGHTS

Roommate seekers are unlikely to show that advertising restrictions violate their privacy rights under the undue burden standard that the Supreme Court has created in other privacy contexts: access to abortion or contraceptives. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court held that a twenty-four hour waiting period for abortions imposed a 'particularly burdensome' obstacle on women with the fewest resources, "those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others,"<sup>95</sup> but that "[did] not demonstrate that the waiting period constitute[d] an undue burden."<sup>96</sup> Given this high bar, even if advertising restrictions require a person to interview ten times as many candidates in order to locate a roommate, the burden they create is unlikely to be deemed "undue," particularly because decisions involving cohabitation are less fundamental than decisions involving reproduction.

The Court's decision in *Carey v. Population Services, International*<sup>97</sup> does suggest that its standard for reviewing infringements on privacy may sometimes be lower than the abortion cases indicate. The Court struck down a New York statute permitting only licensed pharmacists to sell contraceptives, concluding that it imposed a "significant burden" on the right to use contraceptives.<sup>98</sup> At first blush, it seems this law simply made it less convenient for women to obtain contraceptives and was thus not so dissimilar from the roommate advertising prohibitions. However, the Court stated that although not a total ban, the law significantly reduced public access to contraceptives by increasing costs and reducing privacy.<sup>99</sup> In New York's many small towns in 1977,<sup>100</sup> where there may only have been one pharmacy, requiring an unmarried woman to interact with a pharmacist every time she wanted to buy contraceptives could result in a decision to forgo the purchase entirely. In his concurring opinion, Justice Brennan emphasized that the law burdened the right to prevent conception "by substantially limiting access to the means of effectuating that decision."<sup>101</sup>

To some extent, advertising prohibitions "limit access to the means" of finding a roommate, because searches become more time-consuming and costly if people must interview un-

suitable applicants. However, it is unlikely that this would be deemed a *substantial* limitation because the restrictions do not limit whom a roommate seeker may consider or where she can place her ads. They only require her to consider a broader group of applicants than she might otherwise prefer, and ultimately she controls the amount of time she dedicates to her search. Moreover, she maintains a great deal of control through her ad placement decisions. This is quite different from *Carey*, in which the restrictions on how contraceptives could be distributed resulted in a significant reduction in access not just to one's choice of contraceptive but to any contraceptives. Therefore, the restrictions on roommate ads are not unduly burdensome to the point of violating the constitutional right to privacy.

## 3. DISCRIMINATORY ADS AND PRIVACY RIGHTS UNDER THE CALIFORNIA CONSTITUTION

Under California's state privacy standard, a roommate seeker is unlikely to show that advertising prohibitions are an invasion of privacy. She must establish: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by [the] defendant constituting a serious invasion of privacy."<sup>102</sup> People have a privacy interest in selecting a roommate, but not a reasonable expectation of privacy "in the circumstances." Because ads are a means of public communication, it is logical that the interests of those who read ads, and not just those who place them, would be considered

when regulating content.

Furthermore, the restrictions on discriminatory ads do not constitute a "serious invasion of privacy," because in most cases, they do not actually prevent a roommate seeker from locating a suitable roommate, but merely require him to interview additional candidates.<sup>103</sup> It is in this third step that roommate advertising differs from advertising for romantic partners. Although such romantic partner ads are also a means of public communication, people are likely to have far more particularized criteria in a greater number of areas when seeking mates.<sup>104</sup> Advertising restrictions could substantially interfere with locating a compatible companion due to the combination of character-

istics sought. Moreover, there is typically a significantly higher level of anxiety and fear of rejection<sup>105</sup> involved with "interviewing" potential lovers than there is with interviewing potential roommates. Therefore, forcing those looking for love to "interview" many more applicants does constitute a much more serious invasion of privacy.

## 4. DISCRIMINATORY ADS AND FREE SPEECH RIGHTS

The Supreme Court has explained that commercial speech may be distinguished "by its content"<sup>106</sup> and has categorized speech that "inform[s] the public of the availability, nature, and prices of products and services,"<sup>107</sup> and speech in which the speaker's interests are "largely economic," as commercial.<sup>108</sup> It has further explained that the "diverse motives, means and messages of advertising may make speech 'commercial' in widely varying degrees," but that advertising "may be subject to reasonable regulation that serves a legitimate public interest."<sup>109</sup> Roommate ads apprise the public of the availability of rental

*People have a privacy interest in selecting a roommate, but not a reasonable expectation of privacy "in the circumstances."*

housing, and although roommate relationships may be intimate, the ads placed by roommate seekers propose transactions that benefit them financially by reducing housing costs. Indeed, in the cases discussed in Part II, multiple roommate seekers indicated that their motives for seeking a roommate were financial.<sup>110</sup> Moreover, offering shared living space is not “inextricably intertwined”<sup>111</sup> with stating a roommate seeker’s discriminatory criteria regarding those with whom she wants to create an intimate association: As was discussed in Part IV.1, prohibitions on discriminatory ads rarely prevent a roommate seeker from locating a cohabitant.

Roommate ads should thus be evaluated as commercial speech, and their regulation evaluated under the four-part test articulated in *Central Hudson Gas and Electric Corporation v. Public Services Commission of New York*.<sup>112</sup> First, the speech must concern lawful activity and must not be misleading. Second, the government must assert a substantial interest. Third, the regulation must advance that interest, and fourth, it may not be “more extensive than necessary.”<sup>113</sup> This does not mean the absolute least restrictive means; rather, the government has a burden of affirmatively establishing a “reasonable fit” between its interest and the speech restriction.<sup>114</sup> If, as discussed in Part III, the right to choose cohabitants is constitutionally protected under federal intimate association or federal or state privacy rights, then discriminatory roommate ads describe lawful activity and are not misleading. Because the first prong of *Central Hudson* is satisfied in the roommate context, the government must show a substantial interest in barring the ads, and that the restrictions advance the interest asserted without being more extensive than necessary.

#### A. ADS THAT STATE PREFERENCES RELATED TO RACE, NATIONAL ORIGIN OR ANCESTRY

Achieving residential integration was one of Congress’s primary goals when the FHA was enacted in 1968.<sup>115</sup> Nearly forty years later, racially homogenous housing patterns continue to be a serious concern.<sup>116</sup> Thus, the government continues to have a substantial interest in preventing housing discrimination based on race. Despite the fact that roommate seekers may ultimately select whomever they wish as cohabitants, any racially discriminatory housing ads in public forums frustrate the integration of communities by stigmatizing minorities and creating animosity. Thus, as a means of combating racially homogenous housing patterns, a direct and concrete harm, advertising prohibitions do advance the goals of the FHA and are a means no more extensive than necessary to achieve those goals.

Admittedly, the Supreme Court’s decision in *Linmark Associates, Inc. v. Willingboro*<sup>117</sup> reveals an unwillingness to uphold laws enacted to promote integrated housing when the burden on individual rights is too great.<sup>118</sup> The Court struck down a ban on “For Sale” signs, despite a city’s contention that promoting integration justified the ordinance because fear among white homeowners that their property values would drop as the town’s black population increased had caused “panic selling.”<sup>119</sup> The Court sharply denounced the city’s restriction on the free flow of information.<sup>120</sup> However, its decision must be considered in light of the type of restriction under review. “For Sale” signs are a widely-used means of advertising the availabil-

ity of property. Thus, the city was depriving its residents of commercial speech rights enjoyed by virtually all other homeowners. In contrast, prohibitions on discriminatory housing ads are the norm, not the exception.

Furthermore, unlike “For Sale” signs that, on their face, send no stigmatizing message, discriminatory housing ads are per se harmful and inflict an immediate harm on those they degrade. In *Florida Bar v. Went For It, Inc.*,<sup>121</sup> the Supreme Court upheld restrictions prohibiting lawyers from soliciting personal injury or wrongful death clients within thirty

days of an accident under the *Central Hudson* test.<sup>122</sup> It found the attorney ads offended their recipients and tarnished the reputation of attorneys, and that the government has a substantial interest in restricting speech that both creates an immediate harm and has a demonstrable detrimental effect on a particular group. The Court distinguished its decision in *Bolger v. Youngs Drugs Products Corp.*, striking down a federal ban on direct-mail advertisements for contraceptives, on the grounds that the harm that the attorney solicitations caused could not be “eliminated by a brief journey to the trash can.”<sup>123</sup> Whereas contraceptive ads may offend some people, they did not substantially burden recipients who could simply dispose of them.

Similar to the attorney solicitations in *Florida Bar* that were likely to create “outrage and irritation”<sup>124</sup> in their recipients, racially discriminatory ads are likely to have an analogous immediate impact on those they degrade.<sup>125</sup> And, just as the Court found that disposing of the attorney solicitations did little to combat the offense they generated, once a discriminatory ad has been read, its harm is not easily undone.

Moreover, like the ads in *Florida Bar*, racially discriminatory ads create a secondary harm by perpetuating racially homogenous housing patterns. In *United States v. Hunter*,<sup>126</sup> the Fourth Circuit found a newspaper editor liable under 42 U.S.C. § 3604(c) for publishing a Mrs. Murphy’s ad for an apartment in a “white home.” The court explained how seeing significant numbers of such ads in one part of a city could deter non-whites from seeking housing in those neighborhoods, even if other dwellings were available in those areas on a non-discriminatory basis.<sup>127</sup> It further explained that prohibiting even exempt landlords from placing discriminatory ads served the FHA’s purpose because wide circulation of statements of personal prejudice could magnify their negative effect.<sup>128</sup> The wide distribution of roommate ads stating racially discriminatory preferences may similarly deter applicants from applying for roommate situations in certain areas. It is not unlikely that people with racist attitudes live in more racially homogenous neighborhoods. If an applicant sees multiple racially discriminatory roommate listings in a particular neighborhood, she may determine that it would be wiser to seek housing elsewhere, thereby perpetuating the existing housing pattern.

Further, racially discriminatory housing ads stigmatize minorities, frustrating the integration of communities. In his writings on racial stigma and African Americans, economist Glenn C. Loury describes two kinds of behavior: discrimination in contract (in the execution of formal transactions) and discrimination in contact (in the personal associations and relationships created in the private spheres of life).<sup>129</sup> Both have debilitating consequences because the rules of contract and patterns of contact control access to resources and social mobility.<sup>130</sup> “Liberty and autonomy” would become meaningless if people

*It is not unlikely that people with racist attitudes live in more racially homogenous neighborhoods.*



could not discriminate when creating personal relationships, and thus discrimination in contact must remain a prerogative.<sup>131</sup> However, differential treatment of individuals in contract—including housing—can be legitimately regulated because it significantly contributes to racial inequality and stigma.<sup>132</sup>

A 2000 study measuring preferences among various ethnic groups in Los Angeles illustrates the effects of racial stigma on housing.<sup>133</sup> Subjects were asked to imagine the racial mix of a neighborhood in which they would feel most comfortable. Forty percent of Asians, thirty-two percents of Latinos, and nineteen percent of whites envisioned neighborhoods with no African Americans, and immigrants were more likely to exclude African Americans.<sup>134</sup> This suggests that new arrivals to America are taught that African Americans are a group to be avoided.<sup>135</sup> Because discriminatory housing ads are widely circulated, they are likely to contribute to this stigmatization, even in cases in which the underlying discrimination is legal. Restrictions on roommate ads are not simply a case of the government restricting speech in order to combat the spread of beliefs with which it disagrees. Rather, it is regulating housing-related commercial speech to counteract a concrete housing-related harm. The government's substantial interest in promoting integration thus meets the third prong of the *Central Hudson* test.

One might argue that prohibiting discriminatory ads actually contributes to racially homogenous housing patterns because allowing people to candidly state preferences may encourage minorities to seek housing where they otherwise might not.<sup>136</sup> If stating preferences is legal, minority applicants may assume that those who do not state such preferences would welcome them.<sup>137</sup> To the contrary, if stating preferences is prohibited and in a predominantly white neighborhood half the roommate seekers are open to minority applicants and half are not, to create a "match," a minority applicant would have to visit twice as many apartments in that neighborhood.<sup>138</sup> The applicant may not have formal knowledge of those statistics, but over time and talking to others, she may come to suspect it and decide to avoid the white neighborhood, thereby reinforcing the existing housing pattern.<sup>139</sup>

While this model is plausible, the "ifs" are significant. If the percentage of roommate seekers in the white neighborhood who welcome minority applicants is more like 80% or 90%, the number of homes that the applicant would need to visit in order to create a "match" drops considerably, and the stigmatizing effects of discriminatory ads in widely circulated media may reinforce existing housing patterns more than prohibitions do. While it is plausible that if discriminatory ads are allowed, the absence of a stated preference may be turned into a positive, the opposite is equally plausible. Seeing some racist ads may create the impression that prejudice is more widespread than it actually is. Applicants might assume that many more people are racists—particularly people who live in areas with a disproportionate number of discriminatory ads—but do not want to admit their prejudices in print.

Where there are conflicting factual theories, legislatures have latitude in shaping policy. In commercial speech and other First Amendment contexts, the Supreme Court has often deferred to legislative judgments.<sup>140</sup> When the FHA was enacted, Congress decided that even those who are allowed to discrimi-

nate could not publish discriminatory ads related to race, color, religion, or national origin.<sup>141</sup> The same arguments would apply regarding the number of Mrs. Murphy landlords that a minority boarder or renter would need to meet in order to create a "match" and locate housing in a predominantly white neighborhood, but Congress determined that the advertising restrictions were a necessary tool in achieving its integration goals.

The last prong of the *Central Hudson* test is thus satisfied. Although roommate seekers cannot ultimately be forced to live with someone against their will, because racially discriminatory ads stigmatize minority groups in a manner that frustrates integrated housing goals, eliminating such ads from widely accessed public media is a means no more extensive than necessary to further the government's interest in promoting integrated neighborhoods. Thus, as long as *Central Hudson* remains the controlling test for commercial speech,<sup>142</sup> roommate ads that discriminate on the basis of race, ancestry or national origin may be prohibited.

#### B. ADS THAT STATE PREFERENCES RELATED TO OTHER PROTECTED CATEGORIES

It is less clear that barring other types of discriminatory ads, like those expressing preferences based on sexual-orientation or religious practice,<sup>143</sup> passes the *Central Hudson* test. The government has a substantial interest in assuring that all citizens have equal access to housing, but because roommate seekers can ultimately choose their cohabitants, preventing them from advertising their preferences does not make any additional housing available to those with whom they prefer not to live. Whereas the FHA's legislative history is replete with discussions regarding the need to racially integrate housing,<sup>144</sup> its history does not suggest that lawmakers were concerned with integrating housing along other than racial lines.<sup>145</sup> Thus, prohibiting ads stating preferences unrelated to race does not serve the independent legislative objective of integration. These ads do risk creating psychological injury and stigma, but the Supreme Court has held that the government may not restrict speech *only* to prevent such harms. Its decision in *R.A.V. v. City of St. Paul*,<sup>146</sup> striking down an ordinance that made it a misdemeanor to use inflammatory symbols to knowingly arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender," illustrates that a more tangible interest is required to overcome a First Amendment challenge. Racially discriminatory ads are unique because they frustrate the integration of neighborhoods.

A second reason for applying advertising restrictions to Mrs. Murphy landlords, and to roommate seekers, is that these ads could create a false impression that housing discrimination is legal.<sup>147</sup> People may see ads placed by individuals who are uniquely allowed to discriminate, and mistakenly believe that any landlord may do so.<sup>148</sup> But, while preventing confusion may be a substantial government interest, it can likely be achieved without a total ban. Such a ban would be "more extensive than necessary" because a policy to educate would suffice: Disclaimers explaining that housing discrimination is illegal outside the roommate context could be mandated in any ad stating a discriminatory preference.<sup>149</sup> Restrictions that create a total ban on discriminatory ads unrelated to race, national origin, or ancestry therefore likely fail the fourth step of *Central Hudson*.

### C. ADS THAT USE RELIGION AS A PROXY FOR ETHNICITY

The difficult area is when race, national origin and ancestry categories overlap with religion. In *Saint Francis College v. Al-Khazraji*, Justice Brennan explained “the line between discrimination based on ancestry or ethnic characteristics [] and discrimination based on place or nation of ... origin, [] is not a bright one.”<sup>150</sup> Similarly, for members of some religious groups, like Muslims, Jews, Sikhs and Hindus, membership in the religious group is equated with an ethnic distinction, not simply a distinction based on belief. And, the Civil Rights Act of 1866<sup>151</sup> created protection for Jews against racial discrimination—protection that remains intact.<sup>152</sup> Thus, religious preferences in roommate ads must not be used as a means to skirt the prohibitions on discriminatory ads related to race, national origin, or ancestry. The intense discrimination faced by people identified with Islam since September 11, 2001<sup>153</sup> could eventually drive them into segregated enclaves. And, although some may argue that antireligious statements are too tangential to the government’s interest in promoting integration to fall within the “substantial interest,” all groups who could face discrimination on the basis of race must be treated equally in this context. In *Regents of University of California v. Bakke*, the Supreme Court explicitly rejected the idea that judges are equipped to draw lines as to which groups deserve protection against such discrimination.<sup>154</sup> Although discrimination against certain ethnic groups may have more harmful effects in various circumstances, all are to be afforded equal protection.

How then to discern the prohibited religion-as-ethnicity ads from the permissible religion-as-belief ads? Ads that describe the religious practices that roommate seekers perform within the home—like keeping kosher, prohibiting alcohol for religious reasons, studying the bible, or praying, would suggest that the roommate seeker’s preference for a roommate of a particular religion is related to her belief system: she is not simply using religion as a proxy for ethnicity. Under this approach, an ad that states “no Jews” or “no Muslims” or “no Hindus” would be prohibited. However, a religious roommate seeker looking for

a roommate who keeps kosher or observes Ramadan<sup>155</sup> could state so in her ad. Ads that state “no fundamentalists” or “no Atheists” would also be permissible, because they focus on religious ideology and not ethnicity. The tougher case would be ads that read “no Catholics” or “no Protestants” or “no Christians,” as these religions are not identified with a particular race or ancestry. However, they should nonetheless be prohibited. Otherwise, individuals whose national origin or ethnic group is identified with a particular religion would be granted special rights to discriminate: a result that would probably not survive an equal protection challenge.<sup>156</sup>

### 5. ADDITIONAL PROTECTIONS FOR ADVERTISEMENTS THAT STATE RELIGIOUS PREFERENCES

Homogeneity of tastes, attitudes and orientations help create a successful living arrangement,<sup>157</sup> especially when they

stem from religious beliefs.<sup>158</sup> Because religious practice can overlap with the organization of a household, locating cohabitants who share their faith and practices may be uniquely important for devout roommate seekers. When there are few fellow practitioners in the communities where religious individuals live, the advertising restrictions may make it extremely difficult for devout roommate seekers to locate suitable cohabitants. Several provisions in existing legal doctrine may provide additional grounds for as-applied challenges in these cases.

#### a. RFRAS AND PROTECTIONS UNDER RELIGIOUS EXERCISE CLAUSES

Living with an individual of another faith could seriously burden the religious exercise of some roommate seekers. An Orthodox Jew who maintains a kosher kitchen may be concerned that a roommate who does not share her devotion would compromise her practice—perhaps by eating meat on a plate restricted to dairy.<sup>159</sup> Some Hindus may believe that living with an individual who is not a member of their caste jeopardizes their reincarnation.<sup>160</sup> Restrictions on birthday and holiday celebrations could make cohabitation with people of other faiths a serious burden for a Jehovah’s Witness.<sup>161</sup> In towns or cities with large populations of people practicing their faiths, these roommate seekers could probably locate roommates by placing non-discriminatory ads in places where fellow practitioners congregate.<sup>162</sup> However, when roommate seekers are part of a small minority, the restrictions may prevent them from finding a suitable

cohabitant and therefore pose a serious burden, particularly if they cannot afford to live alone.

The Supreme Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith*<sup>163</sup> created an obstacle for such roommate seekers to invoke the free exercise clause of the First Amendment as a defense to fair housing laws. The Court concluded that the clause does not apply to statutes of general applicability that are not directed at religious practice. However, Congress responded by passing the Religious

Freedom Restoration Act of 1993 (RFRA),<sup>164</sup> exempting individuals from generally applicable laws that substantially burden their exercise of religion, unless the government shows the law is the least restrictive means of furthering a compelling government interest. Twelve states have since enacted state RFRAs.<sup>165</sup> The Supreme Court later held that the federal RFRA could not constitutionally restrict state laws,<sup>166</sup> but RFRA’s application to federal laws continues,<sup>167</sup> and state RFRAs continue to apply to state laws. Furthermore, many states apply a compelling interest test similar to the *Sherbert-Yoder*<sup>168</sup> test for infringements on free exercise rights granted by their state constitutions.<sup>169</sup>

State RFRAs or state religious free exercise constitutional provisions are a possible source of protection for devout roommate seekers whose religious practice is substantially burdened by the advertising prohibitions. Religious landlords whose beliefs would be compromised by renting to unmarried cohabitants have sought protection under these provisions. The

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*individuals whose national origin or ethnic group is identified with a particular religion would be granted special rights to discriminate: a result that would probably not survive an equal protection challenge.*

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law remains largely unsettled, but some courts have found merit in the landlords' claims.<sup>170</sup> The California Supreme Court declined to uphold such a landlord's free exercise rights in *Smith v. Fair Housing and Employment Commission (Evelyn Smith)*,<sup>171</sup> but the factors outlined by the court suggest that a burdened roommate seeker could be protected under a RFRA:<sup>172</sup>

(1) The burden must fall on a religious belief rather than a philosophy or a way of life. (2) The burdened religious belief must be sincerely held. (3) The plaintiff must prove the burden is substantial or, in other words, legally significant. (4) If all the foregoing are true, the government must demonstrate that application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling government interest.<sup>173</sup>

Religious roommate seekers likely meet each of the four parts of this test: (1) The housing laws burden religious belief (2) that is sincerely held; (3) the burden is substantial because the laws prevent the devout seeker from locating a roommate who will not interfere with her religious practice; and (4) as described in Part IV.4.b, the government is unlikely to demonstrate that prohibiting ads unrelated to race is a means *no more extensive than necessary* of furthering a compelling state interest. In theory,<sup>174</sup> the *least restrictive means* standard creates an even higher burden on the government.<sup>175</sup> Roommate seekers whose free exercise of religion would be burdened if they were unable to locate a cohabitant would virtually always be describing *their religious practices* (like dietary restrictions, observing the Sabbath, or barring alcohol within their dwelling) in their advertisements. Therefore, the preferences would describe religion in terms of belief, and not as a stigmatizing proxy for ethnicity.<sup>176</sup> Thus, prohibitions on these advertisements would not survive even intermediate scrutiny.<sup>177</sup>

Nonetheless, to raise a RFRA defense, unless a roommate seeker lives in a jurisdiction recognizing an affirmative right to have a roommate, she would need to show that she actually could not afford to live alone – not merely that living alone costs more. The *Evelyn Smith* court explained: “an incidental burden on religious exercise is not substantial if it can be described as simply making religious exercise more expensive.”<sup>178</sup> Given the large number of renters for whom housing costs are categorized as “severe cost burdens,”<sup>179</sup> some roommate seekers are likely to make this showing. Perhaps some could find less desirable housing that required a longer commute or was located in a more dangerous part of town, but denying a renter safe, convenient housing may indeed be held a substantial burden on her religious practice. Thus, RFRA or state free exercise clauses interpreted to follow *Sherbert* and *Yoder* may provide some religious roommate seekers with a defense to generally applicable fair housing laws.

#### B. RIGHTS TO EXPRESSIVE ASSOCIATION

In some cases, roommate seekers are looking for people with whom they can build a religious community for purposes of expressive association. In *Boy Scouts of America v. Dale*, the Supreme Court reaffirmed the First Amendment right “to associ-

ate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>180</sup> Even when a challenged action is not specifically directed to the freedom of association for free speech purposes, strict scrutiny is applied to infringements on that right.<sup>181</sup> To come within First Amendment protection, a group must engage in some form of public or private expression.<sup>182</sup> The association's aim need not be disseminating a certain message or expressing its views to the public.<sup>183</sup> Expression *within* the community suffices; the association need only engage in expressive activity “that could be impaired in order to be entitled to protection.”<sup>184</sup>

Roommate seekers attempting to create an association for the purpose of communal prayer or bible study would likely be afforded “traditional First Amendment”<sup>185</sup> protection: “We are three Christian females . . . We have weekly bible studies and bi-weekly times of fellowship.”<sup>186</sup> As only a small subset of people who respond to roommate ads would be interested in such a relationship, prohibiting these roommate seekers from advertising specific religious practices could substantially interfere with their ability to identify applicants.<sup>187</sup> As discussed, the government is unlikely to demonstrate a compelling state interest that justifies prohibitions on roommate ads stating preferences unrelated to race even under the less rigorous “no more extensive than necessary” standard.<sup>188</sup> The Supreme Court has rejected the suppression of speech that impairs an association's expressive message on First Amendment grounds.<sup>189</sup> By preventing the creation of the association, restrictions that prevent a roommate seeker from identifying a co-worshiper create just as great an injury to the right of expressive association.<sup>190</sup>

### V. PROHIBITIONS ON DISCRIMINATORY STATEMENTS

The FHA's prohibitions on discriminatory statements make illegal any statement “that indicates any preference, limitation, or discrimination” or indicates “*an intention* to make any such preference, limitation, or discrimination,” if based on a protected characteristic.<sup>191</sup> Courts have consistently interpreted “indicates” to mean indicates “to an ordinary reader” or “to an ordinary listener,” regardless of the speaker's actual intent.<sup>192</sup> Thus, roommate seekers who make statements or ask questions that “an ordinary listener” interprets as indicating an intention to make a preference related to a protected characteristic could be held liable under § 3604(c). Phrases as seemingly innocuous as “religious landmark” or “retired,” and even the word “integrated” are potential sources of liability.<sup>193</sup> Inquiries about issues like religion<sup>194</sup> or, in jurisdictions where it is protected, sexual orientation, are prohibited. A roommate seeker could be found in violation of the law for describing her own religious practices or sexual orientation, if it would seem to “an ordinary listener” that the statements indicate a discriminatory preference. The restrictions thus effectively create a category of taboo subjects that people who are considering living together may not discuss without risking liability.

#### 1. INTIMATE ASSOCIATION AND PRIVACY RIGHTS AND DISCRIMINATORY STATEMENTS

Limiting the subjects that potential cohabitants can discuss may substantially burden roommate seekers' ability to create successful roommate relationships and to feel comfortable in their homes. For example, the restrictions could adversely affect an Orthodox Jew who observes Shabbat<sup>195</sup> and must as-

certain that her future roommate will not interfere with her practice. So too for the devout Muslim who prays in the living room – the only room in the apartment with an Eastward facing window – several times a day, or the Evangelical Christian who holds weekly bible studies around the kitchen table. These individuals would want to confirm that a roommate will not interrupt their worship by turning on a television or stereo in their common space while they are deep in prayer or study. Disclosure of these practices also serves applicants' interests. An applicant who wants to watch *Oprah* may be annoyed if her roommate commandeers the living room for prayer, just as an applicant who does not participate in bible study may resent lost access to her kitchen each week. Because it is likely that tensions would later arise as a result of these undisclosed competing desires, a devout roommate seeker could be significantly burdened if unable to discuss her religious practice with a potential cohabitant. The statement prohibitions thus directly and substantially prevent her from establishing a workable roommate relationship, and therefore violate her intimate association rights.

Privacy rights are similarly infringed. If an evangelical Christian who truly believes that homosexuality is a sin winds up with a lesbian roommate because she was unable to determine an applicant's orientation prospectively, greeting her roommate's lover in the bathroom several mornings a week may make her acutely aware that behavior that violates her belief system is occurring within her home. The result may be feelings of alienation in "the one retreat to which men and women [are supposed to be able to] repair to escape the tribulations of their daily pursuits."<sup>196</sup> If an individual cannot exercise enough control over the composition of her household to create an environment in which she feels at ease, the right to privacy seems little more than a platitude. Therefore, under such circumstances, statement prohibitions would likely violate the test outlined in *Carey v. Population Services, International*. Just as limiting the distribution of contraceptives to licensed pharmacists "burden[ed] an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision,"<sup>197</sup> statement prohibitions that prevent a roommate seeker from talking about critical aspects of her personal life or from asking a candidate about matters of great importance to her, substantially limit her ability to effectively select future roommates.

Unlike advertising prohibitions, statement prohibitions actually prevent a roommate seeker from finding a compatible cohabitant. That is, a roommate seeker who is religious, has strong feelings about homosexuality or politics,<sup>198</sup> or cares about national origin or race but cannot discern an applicant's ancestry by looking at her, would be unable to find a suitable cohabitant. Unlike advertising prohibitions, which increase the size of the applicant pool that a roommate seeker must consider, but do not "directly and substantially" interfere with the right to form an intimate association or unduly burden privacy, statement prohibitions may make it impossible for a roommate seeker to determine that an applicant is someone with whom she wants to form an intimate association—someone to whom she will reveal her "backstage" self.<sup>199</sup> Thus, they do "directly and substantially" interfere with her right to intimate association and create an "undue burden" on her privacy rights.

## 2. FREE SPEECH RIGHTS AND STATEMENT PROHIBITIONS

Prohibitions on discriminatory statements unrelated to race, national origin or ancestry do not require new analysis. Even if statements made during the interview process are considered commercial speech, prohibitions on such statements fail the *Central Hudson* test just as prohibitions on parallel advertisements fail because the government is unlikely to establish that such restrictions are no more extensive than necessary to further a substantial government interest.

However, prohibitions on discriminatory statements related to race, national origin or ancestry require a fresh look. The government maintains its interest in integration, but statements made in private are unlikely to undermine this objective and contribute to the stigmatization of minority groups to the extent that widely circulated ads do. The risk remains that individuals subjected to offensive statements may no longer consider a roommate of another race<sup>200</sup> or may restrict their search to neighborhoods primarily inhabited by members of their own race. Nonetheless, statements made in private will not be seen by potentially thousands of people and

thus do not contribute to the stigmatization of minority groups in the way that widely distributed advertisements do. Because the connection to the government's integration objectives is more tenuous, these prohibitions may not pass even the intermediate scrutiny applied to restrictions on commercial speech.

Furthermore, whether these statements should even be classified as commercial speech is less clear. Once prospective cohabitants are identified and roommate seekers and applicants are determining whether they will be compatible, their dialogue may be considered speech afforded full First Amendment protection and restrictions upon it subjected to strict scrutiny. This dialogue cannot be characterized as an advertisement, and although it relates to a commercial transaction—the rental of housing for financial gain—the Supreme Court has explained that speech does not retain its commercial character "when it is inextricably intertwined with otherwise protected speech."<sup>201</sup> Because locating suitable applicants does not require the vast majority of roommate seekers to include discriminatory preferences when they are placing ads, such statements are not "inextricable" in the advertising context. But, there is nothing commercial about a roommate seeker explaining that she wants a roommate who will join her in communal prayer, and she is unlikely to find such a cohabitant if unable to discuss religion when interviewing applicants. As it cannot be extracted from the speech related to the commercial transaction, this speech should retain its full First Amendment protections.

Therefore, the government cannot regulate the statements made when roommate seekers interview applicants, at least those related to determining compatibility. Outside the commercial speech realm, "content-based restrictions are sustained only in the most extraordinary circumstances: 'The First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others.'"<sup>202</sup> In *R.A.V. v. City of St. Paul*,<sup>203</sup> the Court concluded that prohibiting the use of inflammatory symbols was unconstitutional despite its "belief that burning a cross in someone's front

*a devout roommate seeker could be significantly burdened if unable to discuss her religious practice with a potential cohabitant.*

yard [was] reprehensible.”<sup>204</sup> Unless the government can show that prohibitions on discriminatory statements made when roommate seekers are interviewing applicants serve a compelling interest—apart from protecting applicants from exposure to reprehensible ideas<sup>205</sup>—the restrictions also violate the First Amendment.

A determination that the government can prohibit racially discriminatory ads, but not statements between individuals, risks a counterproductive result. Roommate applicants who respond to non-discriminatory ads could then be subjected to offensive statements in a more inimical form, such as those spoken to them directly. However, scholars analyzing prejudice and discrimination in cyberspace suggest that because explicit expressions of prejudice have become taboo, people are significantly less likely to explicitly deny someone a resource or service based on discriminatory criteria when interacting with another person in real time.<sup>206</sup> Rather, they will find a non-explicit excuse for behaving discriminatorily.<sup>207</sup>

Prejudice is more likely to be overtly expressed on the Internet because of the anonymous and disinhibited nature of the forum,<sup>208</sup> where people feel free to express themselves in less self-conscious and less socially desirable ways.<sup>209</sup> One example of this phenomenon is cyberbullying. As explained by a teenager whose friend committed suicide after being harassed by his classmates on-line, “You wouldn’t do that to someone’s face, but on-line it’s completely different. You can do whatever you want and no one can do anything—you’re at your house they’re at their house—it’s different.”<sup>210</sup>

Roommate seekers are more likely to be discreet when dealing with applicants in person than when placing Internet or classified ads. In most of the cases discussed in Part II, the roommate seekers rarely spoke of their own prejudices to the complainants; rather, they either claimed that another roommate had a problem with the candidate, made the statement to a third party, or otherwise diffused their remarks. In *Larrick*, the defendant told the applicant that her *other* roommate did not want to live with a black person.<sup>211</sup> In *Baker*, the respondent explained, via voicemail, that it was his fundamentalist Christian roommate with whom the lesbian applicant “would not get along.”<sup>212</sup> In *DeSantis*, the respondent told the *white* tester that she was afraid of black men.<sup>213</sup> In *Marya v. Slakey*, the roommate who rejected the applicant did not make per se insulting remarks about Indians, instead claiming that he feared a third Indian roommate would create an environment dominated by a single culture.<sup>214</sup> While the statements made in each case vary in degree of offensiveness, the speakers were somewhat sheepish about making them. They may have made more overtly prejudiced statements in an anonymous advertisement. Thus, prohibiting discrimina-

tory ads, even while permitting discriminatory statements, may indeed shield applicants from the most pernicious speech.

## VI. CONCLUSION

Whether it is for months or years, an individual’s choice to allow someone to share her living space is a private decision. The government cannot interfere with the individual’s ultimate selection without violating her Fourteenth Amendment rights. This is no less true when an individual takes a roommate in order to defray housing costs. A conclusion to the contrary would mean that those with fewer resources have lesser rights to intimate association and privacy. Such an outcome runs counter to the Supreme Court’s conclusion in *Zablocki v. Redhail*<sup>215</sup> that people may not be deprived of their fundamental rights of association simply because they are poor.

The more information that a roommate seeker can place in an advertisement—about herself and about what she desires in a roommate—the less time she will spend interviewing unsuitable candidates. Descriptive ads also save applicants the time and energy they would otherwise expend contacting people who are unlikely to accept them. Therefore, both sides benefit when roommate seekers are granted more leeway in advertising their preferences. Nonetheless, there is a tipping point at which the harm that an advertised preference causes outweighs the benefits of targeted advertising. By stigmatizing minority groups, racially discriminatory ads perpetuate racially homogenous housing patterns and the resulting social harms. Although ultimately a roommate seeker can rely on any characteristic in choosing a cohabitant, saving some time is not worth the damage caused by racially discriminatory ads. Furthermore, unlike preferences motivated by practical or religious concerns, like keeping a kosher kitchen, because preferences related to race are often motivated by fear of the unknown, intergroup contact during an interview may cause some roommate seekers to reevaluate their prejudices.<sup>216</sup>

Fair housing laws should thus balance these competing interests. I urge legislatures to recognize the intimate association and privacy concerns that roommate seekers face when choosing those with whom they will negotiate taking out the garbage, cleaning the bathtub, and whether to set up a Christmas tree in the living room. Because these issues are not encountered by either traditional or most Mrs. Murphy landlords, fair housing laws should be amended to address the special considerations of roommate seekers, but the integration goals of the FHA should not be sacrificed.

**The Modern American is available on  
the Westlaw, LexisNexis, and V.lex databases.**

\*J.D. Candidate UCLA School of Law, 2009; B.S., Northwestern University, 1992. I owe special thanks to Eugene Volokh for his advice, critique, and encouragement over many drafts of this article. I also thank Andrew Lim and the staff at The Modern American.

<sup>1</sup> This ad was posted at Roommates.com, as described in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 489 F.3d 921, 929 n.11 (9th Cir. 2007), (*reh'g granted*).

<sup>2</sup> *Id.* at 930 n.1 (Reinhardt, J., concurring) (court's emphasis).

<sup>3</sup> *Id.* at 930 n.2 (Reinhardt, J., concurring) (court's emphasis).

<sup>4</sup> See, e.g., CONN GEN. STAT. ANN. § 46a-81(e) (West 2005).

<sup>5</sup> Senator George D. Aiken of Vermont created this moniker, suggesting that Congress "integrate the Waldorf and other large hotels, but permit the 'Mrs. Murphy landlords,' who run small rooming houses all over the country, to rent their rooms to those they choose." James D. Walsh, Note, *Reaching Mrs. Murphy: A Call for the Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 605 n.3 (1999).

<sup>6</sup> See 42 USCA §§ 3603(b)(2), 3604(c) (West 2003).

<sup>7</sup> In California, a single tenant seeking a roommate may discriminate, but two tenants seeking a third may not. In such cases discrimination—not just discriminatory statements or ads—is banned outright. Its law exempts "Refusal to rent or lease a portion of an owner-occupied single-family house . . . provided that no more than one roomer or boarder is to live within the household, and the owner complies with subdivision (c) of Section 12955, which prohibits discriminatory notices, statements, and advertisements." CAL. GOV'T. CODE § 12927(2)(A) (West 2003).

<sup>8</sup> 42 U.S.C. §§ 1981-1982 (2001).

<sup>9</sup> See Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 221 n.150 (2001).

<sup>10</sup> See *id.* at 221 n.152 (citing *Bill v. Hodges*, 628 F.2d 844, 845 n.1 (4th Cir. 1980)); *Morris v. Cizek*, 503 F.2d 1303, 1304 (7th Cir. 1974); *Johnson v. Zarembo*, 381 F. Supp. 165, 166 (N.D. Ill. 1973)).

<sup>11</sup> In the 2000 census, 4,536,460 people identified themselves as a "housemate or roommate" versus 2,238,177 who identified themselves as a "roomer, boarder or foster child." Household Relationship and Group Population: 2000, Data Set: Census 2000 Summary File 1, 100% Data, Geographic Area: United States, available at [http://factfinder.census.gov/servlet/QTTable?\\_bm=y&-geo\\_id=01000US&-qr\\_name=DEC\\_2000\\_SF1\\_U\\_QTP11&-ds\\_name=DEC\\_2000\\_SF1\\_U](http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=01000US&-qr_name=DEC_2000_SF1_U_QTP11&-ds_name=DEC_2000_SF1_U) (last visited Aug. 25, 2008).

<sup>12</sup> See *Dept. of Fair Employment & Hous. v. Young*, No. H 9900 Q-0256-00-SH, 2003 CAFEHC LEXIS 14, \*7-8 (describing a boarding house owner who imposed strict rules on his tenants—regulating the hours that they could use facilities, charging them \$6 per night for overnight guests, and requiring that they wear indoor footwear inside the house).

<sup>13</sup> The California Department of Fair Employment and Housing heard four of the cases. Under the California Constitution, an administrative agency may not declare a statute unenforceable based on unconstitutionality unless an appellate court has made such a determination. See CAL. CONST. art. III, § 3.5. However, several commissioners expressed concerns regarding the constitutionality of applying fair housing laws in the roommate context. In *Department of Fair Employment & Housing v. Larrick*, three concurring commissioners questioned whether following the law as it currently exists violated the defendants' intimate association and privacy rights and urged the legislature to revisit the issue. No. H 95-96 Q-0510-02, 1998 CAFEHC LEXIS 15 at \*26; See also *Dep't of Fair Employment & Hous. v. DeSantis*, No. 02-12, 2002 WL 1313078 (Cal.F.E.H.C.) at \*9 n.1 ("This case raises significant issues of the constitutional protections of freedom of speech and the right to privacy and association").

<sup>14</sup> *Larrick*, 1998 CAFEHC LEXIS 15.

<sup>15</sup> *Id.* at \*5-6.

<sup>16</sup> The respondents were ordered to pay the complainant's \$744.35 in expenses, \$2,000 in compensatory damages for emotional distress, and the woman who made the statement was charged a civil penalty of \$500. *Id.* at \*18-23.

<sup>17</sup> See CAL. GOV'T CODE ANN. § 12927(2)(A), *supra* note 7. No exemptions permit discriminatory statements under any circumstances.

<sup>18</sup> *Marya v. Slakey*, 190 F. Supp. 2d 95 (D. Mass. 2001).

<sup>19</sup> *Id.* at 99.

<sup>20</sup> *Id.*

<sup>21</sup> The court determined that there was sufficient evidence from which a jury could conclude that the defendant had violated both the FHA and the Civil Rights Act of 1866, 42 U.S.C. §§ 1981-1982 (2001); 190 F. Supp. 2d at 102.

<sup>22</sup> *Sprague v. City of Madison*, No. 94-2983, 1996 WL 544099 (Wis. Ct. App. Sept. 26, 1996).

<sup>23</sup> *Id.* at \*3.

<sup>24</sup> *Id.* at \*1 n.1. The ordinance was amended to include §3.23 (c): "Nothing in this ordinance shall affect any person's decision to share occupancy of a lodging room, apartment or dwelling unit with another person or persons."

<sup>25</sup> Litigation cost \$3300 paid to the plaintiff and \$23,000 in attorneys' fees. See Posting of Eugene Volokh to [http://volokh.com/archives/archive\\_2007\\_05\\_13-2007\\_05\\_19.shtml#1179259134](http://volokh.com/archives/archive_2007_05_13-2007_05_19.shtml#1179259134) (May 15, 2007, at 15:58 PST).

<sup>26</sup> *Dep't of Fair Employment & Hous. v. DeSantis*, No. 02-12, 2002 WL 1313078 \*2 (Cal.F.E.H.C.).

<sup>27</sup> *Id.*

<sup>28</sup> She was ordered to pay \$240 in lost wages because the complainant missed work to attend the hearing, \$500 for emotional distress, and was ordered to attend four hours of training on discrimination under the FHA. *Dep't of Fair Employment & Hous. v. DeSantis*, No. 02-12, 2002 WL 1313078 \*8 (Cal.F.E.H.C.).

<sup>29</sup> *Fair Hous. Advocates Ass'n v. McGlynn*, No. 7979, 1999 Ohio Civil Rights Comm. LEXIS 10.

<sup>30</sup> *Id.* at \*5.

<sup>31</sup> *Id.* at \*6.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at \*6.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at \*11.

<sup>36</sup> *Dep't. of Fair Employment & Hous. v. Baker*, No. H 97-98 Q-0649-00gu, 1999 CAFEHC LEXIS 14.

<sup>37</sup> *Id.* at \*4.

<sup>38</sup> CAL. CIV. CODE § 51(b)(West 2007): "All persons within the jurisdiction of this state are free and equal, and no matter what their . . . sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

<sup>39</sup> *Baker*, 1999 CAFEHC LEXIS 14 at \*9-10.

<sup>40</sup> *Id.* at \*12 (citations omitted).

<sup>41</sup> *Id.* at \*13 (citations omitted).

<sup>42</sup> *Id.* at \*16-17.

<sup>43</sup> Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006), *aff'd* Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008).

<sup>44</sup> *Id.* at 685.

<sup>45</sup> *Id.* at 685-86. Ads posted included: "African Americans and Arabians tend to clash with me . . ."; "Christian single straight female needed."; and "looking for gay latino."

<sup>46</sup> 47 U.S.C. § 230 (2001).

<sup>47</sup> 461 F. Supp. 2d at 698.

<sup>48</sup> 519 F.3d at 668.

<sup>49</sup> *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (*en banc*).

<sup>50</sup> *Id.* at -1165.

<sup>51</sup> *Id.* at 1166.

<sup>52</sup> *Id.* at 1164.

<sup>53</sup> *Roberts v. Jaycees*, 468 U.S. 609, 618-19 (1984).

<sup>54</sup> *Id.* at 619-20 (emphasis added).

<sup>55</sup> See generally ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (Doubleday Anchor Books 1959). Goffman uses theater imagery to describe the mechanisms used to protect individuals' public personas: "Since the vital secrets of a show are visible backstage and since performers behave out of character while there, it is natural to expect that the passage from the front region to the back region will be kept closed to members of the audience or that the entire back region will be kept hidden from them." *Id.* at 113. He emphasizes that people suspend performances among their intimates: "[T]he surest sign of backstage solidarity is to feel that it is safe to lapse into an associable mood of sullen, silent irritability." *Id.* at 132.

<sup>56</sup> GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 95, 96 (Harvard Univ. Press) (2002).

<sup>57</sup> See *cf.* *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (explaining that the government's willingness to exempt some individuals from generally applicable laws "may diminish the credibility of the government's rationale for restricting speech in the first place").

<sup>58</sup> *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

<sup>59</sup> See William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 81 (1986) (citing *Belle Terre* for the proposition that roommate relations raise "no protectable associational interest."); Lucy R. Dollens, *Artificial Insemination: Right of Privacy and the Difficulty in Maintaining Donor Anonymity*, 35 IND. L. REV. 213, fn 62 (2001) (no right of privacy in roommate decisions).

<sup>60</sup> The Eleventh Circuit hypothesized that such an affirmative requirement would be constitutionally problematic in *Senior Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030 (11th Cir. 1992). A couple who lived in a condominium complex that excluded children under the age of sixteen alleged that the 1988 addition of "familial status" to the classes protected by the FHA violated their privacy and association rights. While the court rejected their claims because the law only dictated who their neighbors might be, it nonetheless stated that their privacy claim might be different "[i]f the Act were trying to force plaintiffs to take children into their home." *Id.* at 1036 (emphasis added).

<sup>61</sup> *Carey v. Brown*, 447 U.S. 455, 471 (1980).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) (holding that a ban prohibiting picking outside a particular residence was narrowly tailored to protect residential privacy and did not violate the First Amendment).

<sup>65</sup> See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (upholding the right to have obscene material in one's own home: "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy"); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (upholding the right to practice sodomy in one's own home: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places").

<sup>66</sup> See the privacy clauses in the constitutions of Alaska, Arizona, California, Florida, Hawaii, Louisiana, Montana, South Carolina, and Washington. ARK. CONST. art. 1, § 22; ARIZ. CONST. ART. 2 § 8; CAL. CONST. art. 1, § 1; FLA. CONST. art. 1 § 23; HAW. CONST. art. 1 § 6; LA. CONST. ART. 1, § 5; MO. CONST. art. 2, § 10; S.C. CONST. art. 1, § 10; WASH. CONST. art. 1, § 7.

<sup>67</sup> *City of Santa Barbara v. Adamson*, 27 Cal.3d 123 (1980).

<sup>68</sup> This article focuses on California as one example of a state that offers broader privacy protections under its state constitution than are afforded federally. Additionally, these questions have arisen frequently in cases adjudicated by California's Department of Fair Employment and Housing. See *supra* notes 12, 13, 26 and 36.

<sup>69</sup> Appellants were twelve adults in their 20's and 30's occupying a ten bedroom, six bathroom house. *City of Santa Barbara* 27 Cal.3d at 127.

<sup>70</sup> *Id.* at 127-28.

<sup>71</sup> Citing fair housing laws, the court did state: "Owners with aims like those of Ms. Adamson are, of course, subject to many restrictions applicable to lessors generally. . . ." *Id.* at 134 n.4. However, as discussed in *Young*, 2003 CAFEHC LEXIS 14, the court was not reviewing the applicability of the fair housing laws to roommate seekers, and thus this statement is non-binding dictum.

<sup>72</sup> See *State v. Baker*, 81 N.J. 99, 104, 114 n.10 (N.J. 1979) (Zoning restriction preventing two families from living in a single household—where they ate together, shared common areas and held communal prayer sessions—violated state constitutional due process and privacy rights); *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 552 (N.Y. 1985) (Zoning ordinance restricting single-family housing to persons related by blood, marriage or adoption, or to two people who do not share this relationship but are 62 or older, violated the due process protections embodied in New York's constitution).

<sup>73</sup> *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 39-40 (1994).

<sup>74</sup> *Id.* at 39-40.

<sup>75</sup> *Id.*

<sup>76</sup> *Tom v. City & County of San Francisco*, 120 Cal. App. 4th 674 (2004).

<sup>77</sup> *Id.* at 678.

<sup>78</sup> *Id.* at 687.

<sup>79</sup> See *id.*

<sup>80</sup> *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996).

<sup>81</sup> See *id.* (Public school's policy forbidding married teachers from working at the same school did not directly and substantially interfere with the ability to choose one's mate even though it added sixty-five miles to a couple's commute); *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 616 (11th Cir. 1995) (city government's anti-nepotism policy upheld even though some people might be forced to leave their jobs, because it was "unlikely that the policy [would] actually prevent couples from marrying").

<sup>82</sup> *Zablocki v. Redhail*, 434 U.S. 374 (1978).

<sup>83</sup> *Id.* at 387.

<sup>84</sup> *Id.* at 388.

<sup>85</sup> *Califano v. Jobst*, 434 U.S. 47, 58 (1977).

<sup>86</sup> *Montgomery*, 101 F.3d at 1125.

<sup>87</sup> *Id.* at 1128.

<sup>88</sup> Kathleen F. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

<sup>89</sup> *Id.* at 1416.

<sup>90</sup> *Id.* at 1436-37.

<sup>91</sup> *Id.* at 1437 (citing *Lyng v. Castillo*, 477 U.S. 635 (1986)); *Id.* at 1439 (citing *Lyng v. Int'l Union, UAW*, 485 U.S. 360 (1988)).

<sup>92</sup> *Id.* at 1438 (citations omitted).

<sup>93</sup> See *U.S. v. Booker*, 543 U.S. 220, 274 (2005); see also *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 11 (1988) (rejecting a facial challenge to application of New York's antidiscrimination law to private clubs: "Although there may be clubs that would be entitled to constitutional protection. . . surely it cannot be said that [the law] is invalid on its face because it infringes the private associational rights of each and every club covered by it").

<sup>94</sup> Additional protections for religious roommate seekers are discussed in Part IV 5.

<sup>95</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 886 (1992); see also *Gonzalez v. Carhart*, 127 S. Ct. 1610, 1636 (2007) (upholding a ban on intact dilation and evacuation with no exception to protect the mother's health, despite disagreement in the medical community regarding its health consequences). In *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 434-35, nn.20-21 (1983) (overruled on other grounds), the Court did strike down a restriction requiring second-trimester abortions to be performed in hospitals because the requirement could "significantly limit a woman's ability to obtain an abortion." Forcing women to travel increased both expenses and health risks. The court emphasized that the situation in Akron was "not unique"—in many areas of the country "few, if any, hospitals perform second-trimester abortions." Thus, *Akron* is not in conflict with cases that set a high bar for the undue burden test: The law under review required women to get second-trimester abortions in places that rarely provided them.

<sup>96</sup> 505 U.S. at 886.

<sup>97</sup> *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

<sup>98</sup> *Id.* at 689 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 461-64 (1972) (White, J. concurring)).

<sup>99</sup> *Id.*

<sup>100</sup> Even in 2007, over 330 towns in New York have fewer than 1000 residents. See *City-Data.com*, New York Very Small Towns and Villages, <http://www.city-data.com/city/New-York3.html> (last visited Nov. 2, 2008).

<sup>101</sup> 431 U.S. at 689 n. 5 (1977) (quoting 431 U.S. 678, 703-704) (Powell, J. concurring).

<sup>102</sup> *Hill*, 7 Cal. 4th 1 at 39-40.

<sup>103</sup> See *supra* Part IV 1.

<sup>104</sup> On November 2, 2008, the following ad was posted in the New York Times personals on line: "...Lovely, intelligent, poet/ professor with good bones would like to meet an intelligent, compassionate, witty man for dinner, theater opera. Turn-ons include availability, British Accents, Israel lovers, singers, world travelers, left-leaning liberal of human white activist's, cat lovers, late sleepers, sun/ beach worshipers, Jews, yiddish speakers, interesting story tellers, writers, Stop-pard lovers. . . ." Advertisement 12, <http://query.nytimes.com/gst/personals.html?pqquery=&cat=All&submit2.x=10> (last visited Nov. 2, 2008).

<sup>105</sup> Advertising prohibitions modeled after those in the fair housing context would prevent an individual looking for a mate from describing herself, as well as from describing the characteristics she sought in a partner. Thus, an individual would be prevented from listing her own race, religion, age or, in some jurisdictions, sexual orientation, in her ad, increasing the possibility that she would face rejection during the "interview."

<sup>106</sup> See *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977).

<sup>107</sup> *Id.* at 364.

<sup>108</sup> *Id.*

<sup>109</sup> See *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (overturning the Virginia Supreme Court's decision that ads for New York abortion clinics in Virginia newspapers received no First Amendment protection, but indicating that the state can regulate advertising to some extent so long as it may legitimately regulate the underlying activity).

<sup>110</sup> See *DeSantis*, 2002 WL 1313078 at \*2, (looking for a roommate "to help pay the rent"); *Dep't of Fair Employment & Hous. v. Larrick*, No. H 95-96 Q-0510-02, 1998 CAFEHC LEXIS 15 at \*5-6, (looking for a third person "to share their unit and help pay the rent").

<sup>111</sup> See *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796 (1988) (holding that disclosures regarding the profits of professional solicitors, required before charitable contributions could be requested, were inextricably related to fully protected speech and thus could not be "parceled out" and treated as commercial speech). This is discussed in Part V 2, when prohibitions on discriminatory statements are contrasted with prohibitions on discriminatory advertisements.

<sup>112</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 477 U.S. 557 (1980). Several justices expressed dissatisfaction with the *Central Hudson* test in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) but the test remains good law. See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367-68 (2002)

(plurality opinion); *Anderson v. Treadwell*, 294 F.3d 453, 460, 461 (2d. Cir. 2002); *Passions Video, Inc. v. Nixon*, 458 F.3d 837, 841 (8th Cir. 2006); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 168 (5th Cir. 2007).  
<sup>113</sup> 477 U.S. at 566.

<sup>114</sup> In *Bd. of Trs., State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989), the Court declined to impose a “least-restrictive-means requirement.” It explained that its decision “take[s] account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide[s] the Legislative and Executive Branches needed leeway in a field (commercial speech) ‘traditionally subject to governmental regulation.’” *Id.* at 481 (citations omitted).

<sup>115</sup> See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972). The Court examined the FHA’s legislative history and quoted a statement by Senator Mondale, who drafted the legislation, explaining that the “proposed law was to replace ghettos ‘by truly integrated and balanced living patterns.’” *Id.* at 211 (citing 114 Cong. Rec. 3422).

<sup>116</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), in which the Supreme Court reviewed efforts by public schools “to address the effects of racially identifiable housing patterns on school assignments,” *id.* at 2747, illustrates both that integration remains an elusive goal and the broader repercussions of racially homogenous neighborhoods.

<sup>117</sup> *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977).

<sup>118</sup> The Court determined that a ban on “For Sale” signs left homeowners with no satisfactory means to sell their houses. *Id.* at 92-94.

<sup>119</sup> *Id.* at 87-88.

<sup>120</sup> The Court stated: “The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners’ self-interest. . . .” *Id.* at 96. It continued:

“There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . .”

*Id.* at 97 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

<sup>121</sup> *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

<sup>122</sup> *Id.* at 625-627.

<sup>123</sup> *Bolger v. Youngs Drugs Prod. Corp.*, 463 U.S. 60 (1983).

<sup>124</sup> 515 U.S. at 631.

<sup>125</sup> The bi-racial complainant in *Dep’t of Fair Employment & Housing v. Larrick* who was subjected to a racist statement during a telephone conversation described her reaction as “angry and hurt,” stating that she “felt as though there had been no progress in race relations.” *Dep’t of Fair Employment & Hous. v. Larrick*, No. H 95-96 Q-0510-02, 1998 CAFEHC LEXIS 15, \*8. And, research has shown that exposure to prejudice increases the occurrence of depression, anxiety, and other negative health consequences on people “who perceive high levels of discrimination.” Devah Pager, *The Dynamics of Discrimination*, Nat’l Poverty Center Working Paper Series #06-11 at 4 (June, 2006) (citing Ronald C. Kessler, Kristin D. Mickelson, & David R. Williams, *The Prevalence, Distribution, and Mental Health Correlates of Perceived Discrimination in the United States*, J. OF HEALTH & SOC. BEHAV. 40(3), 208-230 (1990)).

<sup>126</sup> *United States v. Hunter*, 459 F.2d 205, 213 (4th Cir. 1972).

<sup>127</sup> *Id.* at 214.

<sup>128</sup> *Id.* at 215.

<sup>129</sup> GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 95-96 (Harvard Univ. Press) (2002).

<sup>130</sup> *Id.* at 99.

<sup>131</sup> *Id.* at 96.

<sup>132</sup> *Id.* at 100-01.

<sup>133</sup> *Id.* at 90-91 (citing Camille Zubrinsky Charles, *Neighborhood Racial-Composition Preferences: Evidenced from a Multiethnic Metropolis*, 47 SOC. PROBS. 379, 386 (2000)).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 90.

<sup>136</sup> Comments on an earlier draft of this article from Eugene Volokh, UCLA Professor of Law, given Nov. 7, 2007.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-508 (1981) (upholding billboard ban “despite the meager record” showing a connection between billboards and traffic safety); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 50-52 (upholding ordinance which prohibited adult theaters: “The

First Amendment does not require a city . . . to conduct new studies or produce [independent] evidence. . . so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses”) (emphasis added); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (“We do not read our case law to require that empirical data come to us accompanied by a surfeit of background information”). But see *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (plurality opinion) (“[a] commercial speech regulation ‘may not be sustained if it provides only ineffective or remote support for the government’s purpose’”) (citations omitted)).

<sup>141</sup> 42 U.S.C §§ 3604-06, 3617 (1969); see Schwemm, *supra* note 9, at 194.

<sup>142</sup> Proponents of the Supreme Court’s plurality opinion in *44 Liquormart* would suggest that speech related to any lawful transaction be subject to strict scrutiny. *44 Liquormart*, 517 U.S. 484.

<sup>143</sup> As described *infra*, Section IV 4.c, religion is a less clear category because of the overlap with ethnicity.

<sup>144</sup> Senator Mondale explained that segregation and the resulting “ghetto schools” created “[o]ne of the most significant barriers impeding progress and opportunity for Negroes.” See 114 Cong. Rec. 2275, 2276 (1968). Senator Javits stated that “the segregation index of racial residential dissimilarity in 207 cities” is such that, as of 1960, “86 percent of the urban Negro population would have to move to all-white or integrated slums in largely all-white neighborhoods if the segregation was to be at zero.” See 114 Cong. Rec. 2704 (1968). Congressman Halpern stated, “[W]e will never bring it about that Negro pupils and white pupils go to school together—until we make it possible for Negroes to obtain housing outside the ghetto areas of our cities.” See 114 Cong. Rec. 9589 (1968).

<sup>145</sup> The legislative history of the amendments outlawing discrimination on the basis of sex and familial status describes the need to eliminate these types of discrimination, but says nothing about creating residential integration for these groups. See Schwemm, *supra* note 9 at 279 n.417. One sentence in the 1988 Amendments suggests that there was an interest in mainstreaming handicapped persons: “The Fair Housing Amendments Act [] is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the mainstream.” See H.R. Rep. No 100-711 at 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2179; see also Schwemm, *supra* note 9 at 279 n.417. By contrast, the 1988 Amendments contain almost a full page describing the continuing problem of racial segregation. See H.R. Rep. No 100-711 at 15-16 (1988), reprinted in 1988 U.S.C.C.A.N. 2176-77.

<sup>146</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992). The Court’s five-member majority concluded that St. Paul had failed to show that the statute served a compelling interest: “[T]he only interest distinctively served by the content limitation is that of displaying the city council’s special hostility toward the particular biases thus singled out. That is precisely what the First Amendment forbids.” *Id.* at 396. For a broader discussion, including the concerns expressed by the dissenting justices, see Schwemm, *supra* note 9, at 285-289.

<sup>147</sup> See Schwemm, *supra* note 9, at 225-26.

<sup>148</sup> See *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990) (holding that housing organizations that might need to increase educational programs to combat the misimpression created by real estate advertisements that featured only white models had standing).

<sup>149</sup> See *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977) (holding that total ban on advertising prices for “routine” legal services violated the First Amendment where disclaimers or warnings could be required to dissipate the possibility of misleading the public); *Peel v. Attorney Regis. & Discip. Comm’n of Ill.*, 496 U.S. 91, 117 (1990) (holding that an attorney had a First Amendment right to advertise his certification as a trial specialist by the National Board of Trial Advocacy (NBTA), but the State could require him to include a disclaimer stating that the NBTA is a private organization not sanctioned by the State or Federal government).

<sup>150</sup> *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (Brennan, J. concurring).

<sup>151</sup> 42 U.S.C §§ 1981, 1982 (2001).

<sup>152</sup> In *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) the Supreme Court explained:

[T]he Court of Appeals erred in holding that Jews cannot state a § 1982 claim against other white defendants. That view rested on the notion that because Jews today are not thought to be members of a separate race, they cannot make out a claim of racial discrimination within the meaning of § 1982. . . . [T]he question before us is . . . whether, at the time § 1982 was adopted, Jews constituted a group of people that Congress intended to protect. It is evident from the legislative history. . . that Jews and Arabs were among the peoples then considered to be distinct races and hence within the protection of the statute. Jews are not foreclosed from stating a cause of action against



other members of what today is considered to be part of the Caucasian race.

*Id.* at 617-18. See also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 449 (1968) (Douglas, J., concurring) (“[T]he Congress that passed the so-called Open Housing Act in 1968 did not undercut any of the grounds on which § 1982 rests”). See also Schwemm, *supra* note 9.

<sup>153</sup> See generally, Letti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

<sup>154</sup> The Court explained:

As observed above, the white ‘majority’ itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only ‘majority’ left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.

*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295-97 (1978).

<sup>155</sup> During Ramadan, the ninth month of the Muslim calendar, observant Muslims fast during daylight hours. See Ramadan on the Net, Holidays on the Net, <http://www.holidays.net/ramadan/> (last visited Aug. 25, 2008).

<sup>156</sup> Were such ads permissible, a Pakistani woman wishing to discriminate against all non-Pakistanis could place an ad that said “No Christians.” Because the overwhelming majority of Pakistani Americans are Muslim, see Tinaz Pavri, Pakistani Americans: Overview-Religion, <http://www.everyculture.com/multi/Le-Pa/Pakistani-Americans.html> (last visited Jan. 21, 2008), she could impermissibly dissuade many non-Pakistanis from applying, without significantly reducing the pool of applicants she finds acceptable.

<sup>157</sup> See Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 252 (2006). Ellickson describes how “[m]ost people prefer to consort with those who share their orientations and attitudes.” He states that co-occupants are likely to choose others of similar tastes, and that “to the extent that tastes vary according to attributes such as social class, age, gender, and ethnicity, participants in a household relationship can be expected to show a tendency to cluster accordingly.”

<sup>158</sup> Intentional communities united by religious belief have been uniquely successful. Ellickson contrasts long-lived religious sects that require “dozens of adult residents of each of their communities to dine together for virtually all meals,” like the Hutterites, who were organized in 1528 and currently have about 8000 members living on eighty-nine rural settlements in the United States, and convents of the Order of Saint Benedict, established in 530 and maintaining just under 7000 members in a total of 174 monasteries and convents in the United States, with the “secular experiments with strongly communal forms of living and dining [that] implode[d] within a handful of years”: Brook Farm in Massachusetts (1841-47), New Harmony in Indiana (lasting only a few years starting in 1825), and Oneida in New York (1848-1881). *Id.* at 272-73.

<sup>159</sup> “[A] pan used to fry a hamburger or a pot used to make stew become fleishig. If the fleishig pot or pan is then used to boil milk, [Jewish Law] has been violated.” Religion Facts – Keeping Kosher: Jewish Dietary Laws, <http://www.religionfacts.com/judaism/practices/kosher.htm> (last visited Aug. 25, 2008).

<sup>160</sup> Believers may be reincarnated into a higher caste only if they have followed the rules of their caste during their previous life. “In this way karma has discouraged people from attempting to rise to a higher caste or to cross caste lines for social relations of any kind.” “Caste (social),” Microsoft Encarta Online Encyclopedia 2007, <http://encarta.msn.com/encnet/refpages/RefArticle.aspx?refid=761565041> (last visited Aug. 25, 2008).

<sup>161</sup> “All holidays, including birthdays, are considered ‘pagan holidays’ and may not be observed by Witnesses.” Religion Facts – Jehovah’s Witnesses and Holidays, [http://www.religionfacts.com/jehovahs\\_witnesses/holidays.htm](http://www.religionfacts.com/jehovahs_witnesses/holidays.htm) (last visited Aug. 25, 2008).

<sup>162</sup> Placing ads exclusively in such locations would violate the FHA: 24 C.F.R. § 100.75(3), which prohibits “selecting media or locations for advertising the sale

or rental of dwellings which deny particular segments of the housing market information about housing opportunities because of . . . religion . . .” However, roommate seekers could include these locations among the places they list their ads. And, realistically, it is unlikely that anyone would sue an Orthodox Jew who, seeking a kosher roommate, listed his apartment exclusively on the bulletin board at his synagogue or in a local Jewish newspaper.

<sup>163</sup> *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 881 (1990) (holding that Oregon’s application of a generally applicable criminal prohibition to the sacramental use of peyote by members of the Native American Church did not violate the free exercise clause).

<sup>164</sup> 42 U.S.C. §§ 2000bb (2001).

<sup>165</sup> See ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02 (West 2004); CONN. GEN. STAT. ANN. § 52-571b (West Supp. 2004); FLA. STAT. ANN. §§ 761.01-.05 (West Supp. 2004); IDAHO CODE §§ 73-401 to -404 (Michie Supp. 2004); 775 ILL. COMP. STAT. ANN. 35/1-99 (West 2001 & Supp. 2004); MO. ANN. STAT. §§ 1.302-.307 (West Supp. 2004); N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (Michie Supp. 2000); OKLA. STAT. ANN. tit. 51, §§ 251-258 (West Supp. 2004); 71 PA. CONS. STAT. ANN. §§ 2401-2407 (West Supp. 2004); R.I. GEN. LAWS §§ 42-80.1-1 to -4 (1998); S.C. CODE ANN. §§ 1-32-10 to -60 (West Supp. 2003); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (Vernon 2004).

<sup>166</sup> See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>167</sup> See *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (holding that the government failed to demonstrate a compelling state interest in prohibiting a religious sect’s sacramental use of a hoasca tea containing DMT, a hallucinogenic regulated under the Controlled Substances Act).

<sup>168</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963) (creating exemptions under the free exercise clause when a generally applicable law that did not pass strict scrutiny substantially burdened religious conduct); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972), (holding that a compulsory education law violated the free exercise rights of the Amish).

<sup>169</sup> See *Hunt v. Hunt*, 162 Vt. 423, 436 (1994); *State v. Hershberger*, 462 N.W. 2d 393, 397-98 (Minn. 1990); *Rourke v. N.Y. State Dept. of Corr. Serv.*, 603 N.Y.S. 2d 647, 649-50 (N.Y. Sup. Ct. 1993) (*aff’d*, 615 N.Y.S.2d 470, 472-73 (N.Y. App. Div. 1994)). For an exhaustive list, see Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 211-12 (2004).

<sup>170</sup> See *State by Cooper v. French*, 460 N.W.2d 2, 9-11 (Minn. 1990) (The court upheld a landlord’s right not to rent to unmarried cohabitants. Three justices held that the Minnesota Constitution granted far broader religious freedom protection than the United States Constitution. Finding the text of the fair housing statute dispositive, the concurring justice did not reach the constitutional question.); *Attorney General v. Desilets*, 636 N.E.2d 233, 240, 243 n.15 (Mass. 1994) (The court held that the fair housing law substantially burdened the landlord’s free exercise rights, but whether Massachusetts had a compelling interest in ensuring rental housing to unmarried people was a fact question precluding summary judgment. Three dissenting justices held that the Massachusetts constitution “absolutely protect[ed] the defendants’ right to decline to lease any premises to a cohabitating couple”).

<sup>171</sup> *Smith v. Fair Hous. & Employment Comm’n* (Evelyn Smith), 12 Cal.4th 1143 (1996) (plurality opinion).

<sup>172</sup> *Evelyn Smith* predated *City of Boerne v. Flores*, and thus the Court reviewed Smith’s case under the federal RFRA, but an analysis under a state RFRA would likely be similar.

<sup>173</sup> 12 Cal.4th at 1166-67.

<sup>174</sup> See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis For Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994). Describing the test in religious freedom cases as “strict in theory but feeble in fact,” Eisgruber and Sager explain that modern strict scrutiny has been relatively deferential. However, as discussed, prohibitions on discriminatory roommate advertisements related to religious practice are unlikely to be upheld even under intermediate scrutiny. In jurisdictions where courts apply rational basis review to RFRA claims, seeking protection under a RFRA would be a less viable option than raising a free speech challenge as described in section IV.4.b.

<sup>175</sup> See *See Bd. of Trs., State Univ. of N.Y. v. Fox*, 492 U.S. 469; *supra* note 103.

<sup>176</sup> See the discussion in Part IV 4.c regarding advertisements that describe religion-as-belief versus religion-as-ethnicity.

<sup>177</sup> See *supra* Part IV.4.b-c.

<sup>178</sup> 12 Cal. 4th at 1173 (“[i]t is well established that there is no substantial burden placed on an individual’s free exercise of religion where a law or policy [regulating secular conduct] merely ‘operates so as to make the practice of [the individual’s] religious beliefs more expensive’”) (citations omitted).

<sup>179</sup> Between 2001 and 2004, the number of households paying more than half their income for housing—considered “severe cost burdens”—increased by

nearly 2 million to a record 15.8 million. The total record of households paying at least 30 percent of income on housing—considered “at least moderate cost burdens”—rose from 31.3 million to over 35 million. The incidence is higher among renters. THE STATE OF THE NATION’S HOUSING 2006, Joint Center for Housing Studies of Harvard University, pg. 25, available at <http://www.jchs.harvard.edu/publications/markets/son2006/index.htm> (last visited Aug. 25, 2008).

<sup>180</sup> *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (quoting *Roberts v. Jaycees*, 468 U.S. 609, 622 (1984) (New Jersey’s public accommodations law held to violate the Boy Scout’s rights to freedom of association by forcing the organization to retain an openly gay assistant scoutmaster)).

<sup>181</sup> 468 U.S. at 624-25.

<sup>182</sup> 530 U.S. at 648.

<sup>183</sup> *Id.* at 659.

<sup>184</sup> *Id.* at 655 (describing its decision in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)) (purpose of St. Patrick’s day parade “was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless.”).

<sup>185</sup> 530 U.S. at 659.

<sup>186</sup> See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 489 F.3d 921, 930 n.2 (9th Cir. 2007) (Reinhardt, J., concurring) (court’s emphasis).

<sup>187</sup> As discussed *supra* in Part IV.1, such roommate seekers may also raise as-applied intimate association challenges, arguing that the prohibitions directly and substantially interfere with their ability to create an association.

<sup>188</sup> See *supra* Part IV.4.b.

<sup>189</sup> 530 U.S. at 661 (stating “We are not, as we must not be, guided by our views of whether the Boy Scouts’ teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization’s expression does not justify the State’s effort to compel the organization to accept members where such acceptance would derogate from the organization’s expressive message”).

<sup>190</sup> Additionally, devout roommate seekers may assert a hybrid-rights claim, arguing that the advertising restrictions should be reviewed under strict scrutiny because more than one constitutional right is implicated: their free exercise rights coupled with either expressive association, intimate association, or free speech rights. In *Smith*, the Supreme Court suggested that a higher standard of review may apply where a case involved the Free Exercise clause in conjunction with other constitutional protections. *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 882 (1990). However, to date, the Court has yet to apply strict scrutiny to a hybrid-rights claim, and Justice Souter has criticized the theory in a concurring opinion. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J. concurring) (“[i]f a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule....”). Furthermore, the Second and Sixth Circuits have explicitly rejected the hybrid rights language from *Smith* as dicta, concluding the standard of review should not vary “simply with the number of constitutional rights that the plaintiff asserts have been violated.” *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003); see also *Kissinger v. Bd. of Trs. of the Ohio State Uni., Coll. of Vet. Med.*, 5 F.3d 177 (6th Cir.1993). Thus, the hybrid-rights approach seems a less viable option.

<sup>191</sup> See 42 USCA § 3604(c) (2003).

<sup>192</sup> See, e.g., *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993) (Plaintiff could bring action if housing ads “‘suggest[ed] to an ordinary reader that a particular race [was] preferred or dispreferred for the housing in question,’ regardless of the defendant’s intent”) (quoting *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1000 (2d Cir. 1991)); see also Schwemm, *supra* note 9, at 210-11.

<sup>193</sup> See GUIDELINES ON HOW TO ADVERTISE WITHOUT VIOLATING HOUSING DISCRIMINATION LAWS, available at [http://www.ndfhc.org/fair\\_housing/PDF-NDDOL%20Fair%20Housing%20Ads.pdf](http://www.ndfhc.org/fair_housing/PDF-NDDOL%20Fair%20Housing%20Ads.pdf) (last visited Aug. 25, 2008). Because the statement and advertisement prohibitions are both contained in 42 USCA § 3604(c), the same phrases would likely create liability in either context.

<sup>194</sup> *Id.*

<sup>195</sup> Those who strictly observe the Sabbath are forbidden from activities including, but not limited to: using the phone, operating anything electric or electronic, and flipping light switches from 18 minutes before sunset on Fridays until night-fall (approximately 40 minutes after sunset) on Saturdays. See Ask Moses, [http://www.askmoses.com/article\\_list.html?h=208](http://www.askmoses.com/article_list.html?h=208) (last visited Aug. 25, 2008).

<sup>196</sup> *Carey v. Brown*, 447 U.S. 455, 471 (1980).

<sup>197</sup> *Carey v. Population Servs., Int’l*, 431 U.S. at 689 n.5 (emphasis added).

<sup>198</sup> The District of Columbia Human Rights Act prohibits discrimination based on a wider range of criteria including political affiliation. D.C. CODE ANN. § 1-2512(a) (1992).

<sup>199</sup> See Goffman, *supra* note 55.

<sup>200</sup> The complainant in *Department of Fair Employment & Housing v. Larrick* who was subjected to a racist statement during a telephone conversation described how her experience “changed her feelings about Caucasians,” stating that she “began to avoid socializing with Caucasians, except her mother.” Dep’t of Fair Employment & Hous. v. Larrick, No. H 95-96 Q-0510-02, 1998 CAFEHC LEXIS 15, \*8.

<sup>201</sup> See *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 796 (1988).

<sup>202</sup> *S. Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868, 888 (7th Cir. 1991). (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

<sup>203</sup> See generally, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The statute under review only outlawed cross-burning only when the underlying purpose was to insult or provoke violence “on the basis of race, color, creed, religion or gender” and was therefore unconstitutional content discrimination. *Id.* at 391.

<sup>204</sup> *Id.* at 396.

<sup>205</sup> Although St. Paul argued that its statute fell within an exemption permitting content discrimination aimed at the “secondary effects” of speech, *id.* at 394 (citation omitted), the Court stated that “[l]istener’ reactions to speech’ are not a type of secondary effect that make content discrimination constitutional. *Id.* at 394. “The emotive impact of speech on its audience is not a ‘secondary effect.’” *Id.* (citation omitted).

<sup>206</sup> Jack Glaser & Kimberly Kahn, *Prejudice, Discrimination, and the Internet, in THE SOCIAL NET: UNDERSTANDING HUMAN BEHAVIOR IN CYBERSPACE* 247, 248 (Yair Amichai-Hamburger ed., 2005) (citing F. Crosby, S. Bromley, & L.Saxe, *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546-63 (1980)).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* Glaser and Kahn compare behavior in cyberspace to the pre-civil rights era conduct revealed in a classic study conducted by sociologist R.T. LaPiere. As reported in Richard T. LaPiere, *Attitudes vs. Actions*, 13 SOC. FORCES 230-37 (Dec. 1934), LaPiere traveled around the United States with a Chinese couple in 1934 seeking public accommodations in hotels, auto camps, restaurants, and cafés. They were only turned away 1 out of 251 times. Six months later, LaPiere sent questionnaires to each of the establishments and asked if they would accommodate a Chinese guest. Over 90% responded that they would not. LaPiere’s analysis focused on the unreliability of questionnaires as predictors of how people will behave when confronted with a live human being, but the study also suggests that people are more likely to express overt prejudice in an anonymous, disinhibited forum. *Id.* at 236.

<sup>209</sup> Glaser & Kahn, *supra* note 206, at 250.

<sup>210</sup> *Frontline: Growing up Online*: (PBS television broadcast Jan. 22, 2008), available at <http://www.pbs.org/wgbh/pages/frontline/kidsonline/> (Go to chapter 6, *Cyberbullying*, at approximately 4:18).

<sup>211</sup> Dep’t of Fair Employment & Hous. v. Larrick, No. H 95-96 Q-0510-02, 1998 CAFEHC LEXIS 15, \*7.

<sup>212</sup> Dep’t. of Fair Employment & Hous. v. Baker, No. H 97-98 Q-0649-00gu, 1999 CAFEHC LEXIS 14, \*4.

<sup>213</sup> Dep’t of Fair Employment & Hous. v. DeSantis, No. 02-12, 2002 WL 1313078 (Cal.F.E.H.C.) at \*3.

<sup>214</sup> *Marya v. Slakey*, 190 F.Supp.2d 95, 98 (D.Mass 2001).

<sup>215</sup> See *Zablocki v. Redhail*, 434 U.S. 374 (1978).

<sup>216</sup> See generally Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751 (2006). Synthesizing 713 independent samples from 515 studies, Pettigrew and Tropp conclude that intergroup contact typically reduces intergroup prejudice. The positive effects of intergroup contact are enhanced by equal status between the groups in the situation, common goals, intergroup cooperation, and the support of authorities, law or custom, but these conditions are not essential for the contact to achieve a positive outcome. *Id.* at 766. Their analysis shows that intergroup contact effects generalize beyond the individuals in the particular situation, improving attitudes towards the entire outgroup and even outgroups not involved in the interaction. *Id.* They acknowledge that negative interactions can raise anxiety and feelings of threat, hindering the development of favorable attitudes. *Id.* at 767, n.13. But, the vast majority of samples in their analysis show an inverse relationship between intergroup contact and prejudice. *Id.* at 766.